IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-483

JAMES U. RUPPERT,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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AUTHORITIES

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Petitioner, James U. Ruppert, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in this cause on May 17, 1978.

OPINIONS BELOW

The decision of the Supreme Court of Ohio was filed on May 17, 1978, and is reported at 54 Ohio St. 2d 263, 375 N.E.2d 1250 (1978, appended hereto as Appendix A. Unreported decisions of the Court of Appeals for Butler County, Ohio, and the Court of Common Pleas, Butler County, Ohio, are appended hereto as Appendix B and C, respectively. The judgment entry of Supreme Court of Ohio is appended hereto as Appendix D.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on May 17, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Whether in a trial before a three-judge panel in a capital case in which the death penalty at the time was in force that the petitioner could be convicted by a simple majority of a three-judge panel.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT V:

> "No person shall . . . be deprived of life, liberty or property, without due process of law."

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV:

> ". . . Nor shall any State deprive any person of Life, Liberty or property, without due process of Law, nor Law nor deny to any person within its jurisdiction the equal protection of the Law . . ."

STATEMENT OF THE CASE

A. Facts

On March 30, 1975 at approximately 9:30 p.m., the Hamilton Police received a phone message that a man had been shot at 635 Minor Avenue in Hamilton, Ohio. On that cold, windy, snowy night began one of the worst tragedies in the history of the United States. The Hamilton Police were soon to find an unbelievable sight awaiting them.

Officer Robert Minor of the Hamilton Police Department responded to 635 Minor Avenue and found a male white waiting for him in the doorway, this being James Ruppert. Ruppert indicated to Minor that he had been there since 5:00 p.m., and Minor immediately put him in the cruiser. The officer then looked inside the house and saw a number of bodies and called for assistance, which was quick in coming.

Throughout the night of March 30, 1975, and the early morning hours of March 31, 1975, literally hundreds of persons arrived at the Minor Avenue house, including a vast number of police officials, the Butler County Prosecutor, the Butler County Coroner, and spectators as well as news media.

Ruppert was taken to the Hamilton Police Department where, after a short conversation with Detective Ebbing, he asked for counsel and was assisted in dialing attorney H. J. Bressler who responded to the Police Department at approximately 10:45 p.m.

In the meantime, the officers on the scene began their investigation. Officer Darryl Philpot took pictures of the scene, as well as the hand guns which were found in the house lying on the table.

Inside of the house at 635 Minor Avenue, a grizzly scene awaited those who entered. On the first floor of this two-story house throughout the two rooms on that floor were eleven bodies, including the mother of James Ruppert, the brother of James Ruppert, the sister-in-law of James Ruppert, and the eight nieces and nephews of James Ruppert ranging in age from 4 to 17. All died of gunshot wounds between 5:30 and 6:30 p.m. on March 30, 1975.

Doctor Boone testified that in all there were 40 gunshot wounds in the bodies, and the staff from the Bureau of Criminal Investigation and Identification confirmed that the weapons used to inflict the wounds were the pistols found at the scene lying on the table.

On March 31, 1975, James Ruppert was taken to the Hamilton Municipal Court for a preliminary arraignment in front of Acting Judge John Moser. Judge Moser ordered that facilities be provided for psychological and psychiatric examinations of Ruppert immediately.

On March 31, 1975, less than 24 hours from the killing, the first of many psychological and psychiatric examinations was conducted on James Ruppert at the Butler County Jail the initial examination being a psychological by Doctor Donald Ormiston, a psychologist involved in both private practice and attached to the Butler County Forensic Unit in Butler County, Ohio.

The following day, Tuesday, April 1, 1975, James Ruppert was examined by psychiatrist Glenn Weaver from Cincinnati at the Butler County Jail; and, by the end of that initial week, Ruppert was examined two more times, on April 4, 1975, by Doctor Philip Mechanick, a professor of psychiatry at the University of Pennsylvania, and by Doctor Henry Backrach, a professor of psychology at the University of Pennsylvania, on April 5, 1975.

Before the trial began, Ruppert was to be examined by seven more psychiatrists and one more psychologist, being Doctors Lester Grinspoon, professor of psychiatry at Harvard University, Doctor Donald Stevens, a psychiatrist from Hamilton, Ohio, Doctor Leigh Roberts, a professor of psychiatry at the University of Wisconsin, Doctor Howard Sokolov, a professor of psychiatry at the University of Cincinnati attached to Butler County Forensic, Doctor Robert McDevitt, a professor of psychiatry at the University of Cincinnati and attached to Butler County Forensic, Dr. Glen Weaver, a professor of psychiatry at the University of Cincinnati, Doctor D. A. Thomas, retained by the State of Ohio as a psychiatrist, and Doctor Charles Feuss, a professor of psychiatry at the University of Cincinnati, and Doctor Victor Thaler, a psychiologist retained by the State of Ohio.

The State of Ohio obtained a direct indictment against James Ruppert within two weeks from that tragic day on March 30, 1975; and Ruppert was ordered to stand trial for 11 counts of aggravated murder.

At the arraignment of James Ruppert, a plea of "not fuilty by reason of insanity" was entered; and, for three months, Ruppert underwent a barrage of psychiatric and psychological examinations, the purpose of which was to determine his sanity to stand trial and whether, at the time of the commission of the offense, he was legally insane.

On June 6, 1975, in open court, James Ruppert waived his right to trial by jury in front of the Honorable Fred Cramer. At the waiver, the Court informed Ruppert that, upon waiving a trial by jury, he would be tried by Judges Fred Cramer, Arthur Fiehrer, and Robert Marrs. He was further informed that, in order to be found guilty or not guilty of any or all of the 11 counts all three judges would have to agree.

The Judge went on to inform Ruppert that, in order to be found sane or insane at the time of the commission of the offense, all three judges must also agree. After a discussion with Ruppert, the Court agreed to the jury waiver.

On the 16th day of June, 1975, the trial of James Ruppert began in the Common Pleas Court of Butler County, Ohio. Again Ruppert was asked to re-affirm his waiver of jury; and he did so without further explanation by the Court as to any changes in the Court's position regarding the necessity of a unanimous verdict in the case.

On July 3, 1975, a verdict of guilty of all 11 counts of aggravated murder was returned against James Ruppert by a majority of the three judge panel, Judge Cramer dissenting from the Court's finding.

On July 14, 1975, Ruppert was again brought in front of the Court for sentencing and for a determination of the existence of any mitigating circumstances which would nullify the death penalty. The Court found that it could not unanimously find that none of the mitigating circumstances set forth in the statute were established by preponderance of the evidence and sentenced Ruppert by a majority of the Court to be confined in the Ohio State Penitentiary at Lucasville on each of the 11 counts consecutively through life terms.

B. Motion for a New Trial

On July 22, 1975, in front of the same three judge panel, a motion for a new trial was heard and overruled. During the motion for a new trial, Judge Fred Cramer, who had been a Common Pleas Judge for over 30 years, dissented and found that a unanimous verdict for conviction was necessary.

Judge Cramer also dissented in the Court's finding regarding the issue of guilt.

The defendant-appellee after sentencing was sent into the Ohio Penal System for processing. Within a short period of time, something less than two weeks, the prison psychiatrist determined that Ruppert did not belong in the penal system and indeed for his safety and for the safety of others belonged in Lima State Hospital for the criminally insane. Ruppert has remained at Lima since July of 1975.

C. Proceedings on Appeal

James Ruppert appealed his conviction to the Court of Appeals Butler County, First Appellate District of Ohio, which reversed the conviction by a decision filed August 5, 1977. (See Appendix B.)

Within his eight Assignments of Error Petitioner urged a reversal of the conviction by a majority verdict on the basis that the statutory provisions for a majority findings by a three-judge court under Revised Code 2945.06 had been repealed by implication with the enactment of the 1974 Ohio Code and that the provisions for a majority decision would violate equal protection and due process. The Court of Appeals did not agree with the arguments, stating that the *Ohio Revised Code Section 2945.06* was

still in full force in effect and that the Respondent was not denied due process or equal protection, relying on the authority of *State* v. *Robbins,* 176 OS 362.

D. Proceedings in the Supreme Court of Ohio

Respondent's Motion for leave of appeal the Court of Appeals Decision was granted by the Supreme Court of Ohio which affirmed the judgment of the Court of Appeals by its decision dated May 17, 1978. (Appendix's A&D).

Petitioner cross-appealed the challenge of validity of a majority verdict in a three-judge court. The Supreme Court ruled that a majority of the three-judge panel may render a guilty verdict in the first phase of the aggravated murder trial of holding *Ohio Revised Code Section 2945.06* and refusing to find that it had either violated due process, equal protection or had been repealed by implication.

This Court again relied on the prior decision of *State* v. *Robbins,* 176 OS 362 199 NE (2d) 742 (1964).

E. Proceedings in the Supreme Court of the United States

After the affirmance of the reversal by the First District Court of Appeals, Butler County, Ohio on the basis that the Petitioner's jury waiver was not knowing, intelligent and voluntary, and ordering a new trial for petitioner, John Holcomb, Butler County Prosecutor, petitioned this Court for a writ of certiorari to determine whether or not due process required the jury waiver to be set aside.

Petitioner James Ruppert submits to this court that should it choose to grant the writ of certiorari to the respondent in this case, who is also petitioner in the other case, it should likewise grant certiorari to this petitioner

to determine whether or not a three-judge panel must be unanimous since the questions involved are so intertwined with one another as to require their joint resolution.

REASONS WHY CERTIORARI SHOULD BE GRANTED

This court should determine whether or not due process and equal protection require that a three-judge panel be unanimous when state law in the State of Ohio requires that a jury verdict be unanimous when the case involves a capital case with the possibility of the death penalty.

The petitioner James Ruppert was convicted by the verdict of two of the three judge panel. The petitioner was advised by the court prior to waiving the jury, and was also advised by counsel, that it would require the three judges to convict the defendant.

Thereafter petitioner was convicted by only a majority of the three-judge panel. The court's decision overruling the motion for a new trial and finding that it was not necessary for the court to come to a unanimous conclusion is found in Appendix C. Judge Cramer, however, dissented stating that he felt that a unanimous verdict was required. Two statutes are in question. They are 2945.06 and 2929.03 and are contained in Appendix E. 2945.06 basically provides:

> ". . . Such judges, or a majority of them may decide all questions of fact and law arising upon the trial and rendered judgment accordingly . . ."

This statute was enacted in Ohio in 1953. However, in 1974 2929.03 entitled Imposing Sentence for a Capital Offense was enacted. That provided that if a panel of three-judges tried a capital case then all three must agree

before the death sentence is imposed. The committee comment also reproduced in Appendix E read in part:

> ". . . The procedure is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state. The same rules of evidence apply, the specification must be proved beyond a reasonable doubt and the panel's verdict must be unanimous . . ."

Thus the committee comments made it clear that the legislature was under the opinion that a three-judge panel must be unanimous. Judge Cramer argued that 2945.06 was repealed by implication and that in addition he was denied due process and equal protection guaranteed by 14th Amendment to the United States Constitution.

However, the First District Court of Appeals and the Supreme Court of Ohio disagreed basing their decision on the case of *State* v. *Robbins,* 176 OS 362. The lower court decision in that case in the Court of Appeals at 189 NE (2d) 641 had held that the defendant who waived a trial by jury does not thereby waive a trial and on a trial before a three judge panel he retained all his constitutional and statutory rights which included a unanimous verdict of a three-judge panel.

The Supreme Court of Ohio reversed, stating that the concurrence of only two of the three judges was necessary. However there were differences. The case was brought under an old section 2945.07, since repealed, which allowed a conviction by a three-judge panel by a non-unanimous decision in a non capital case. The question of whether a non-unanimous decision was allowed in a capital case was never ruled on by either court.

In addition the Supreme Court of Ohio decided a case coming from the First District Court of Appeals in Ohio

which was *State of Ohio* v. *Willie Lee Bell,* No. C-75068 and was affirmed by the Supreme Court at 48 OS (2d) 272, and stated:

> ". . . Although appellant asserts that there is a greater possibility of convincing one of three judges on a panel on a mitigating factor than one judge alone by the same logic there is also a greater possibility of convincing one or more of 12 jurors of the absence of the evidence of guilty beyond a reasonable doubt than so convincing one of three judges . . ."

Thus the Ohio Supreme Court implied in the *Bell* case that it was more likely to convince one out of twelve jurors than one of three judges that guilt beyond a reasonable doubt did not exist. If that was the case then certainly the three judges would be required to be unanimous. In other words there could not be "a hung panel" as there could be a "hung jury" since with a simple majority the panel must always come to a decision which would likewise negate proof beyond a reasonable doubt.

Furthermore, the Robbins case, relied on by both courts did not decide the questions of equal protection or due process since they were not raised and apparently the Supreme Court did not consider them.

This Court in the case of *Johnson* v. *Louisiana,* 406 U.S. 356 and *Apodaca* v. *Oregon,* 406 U.S. 404 noted that these cases were non-capital cases. The Court in *Johnson* v. *Louisiana* noted that state law required unanimity in a capital case. In view of the Court's recent rulings about the death penalty, i.e., the need to explore all mitigating factors and holding the death penalty to be cruel and unusual punishment in a rape case, it would seem obvious then that before defendant could be put to death the panel which convicted him must at least be unanimous.

In addition it might be noted that in *Johnson* 75% was required whereas in the three judge panel only 66 2/3% is required to convict.

Mr. Justice Blackman concurring in *Johnson* v. *Louisiana,* supra stated:

> ". . . I do not hesitate to say either a system employing a 7-5 standard rather than a 9-3, or 75% minimum would afford me great difficulty . . ."

As Mr. Justice White points out ante at 362, 32 LEd. (2d) at 159:

> ". . . A substantial majority of the jury are to be convinced. That is all that is before us in each of these cases . . ."

In addition it must be stressed that the one dissenter in petitioner's case in the Court of Common Pleas was a very learned judge, the one with the most experience on the bench. His opinion must be given greater weight than the mere dissenting of perhaps one juror.

Likewise in *Apodaca* v. *Oregon,* the court noted that the 10-2 verdict was allowable in all cases in Oregon except for first degree murder. Therefore this likewise could not have been a capital case.

Thus, this court has never decided whether or not either a panel of judges or a jury must be unanimous in a capital case. Petitioner thus submits that he was denied equal protection and due process and that the law provides that a conviction by a three-judge panel must be unanimous.

CONCLUSION

Therefore, petitioner submits to this court that he was denied equal protection and due process in this case and that this court should grant certiorari to this question, should it also grant the prosecutor's petition for writ of certiorari presently pending in this case.

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APPENDIX A

Opinion of the Supreme Court of Ohio, 54 Ohio St. 2d 263, 375 N.E. 2d 1250 (1978), Entered May 17, 1978.

THE STATE OF OHIO, APPELLANT AND CROSS-APPELLEE, *v.* RUPPERT, APPELLEE AND CROSS-APPELLANT.

[Cite as State v. Ruppert (1978), 54 Ohio St. 2d 263.]

Criminal law—Capital offense—Waiver of jury trial—Not properly made, when—Three-judge panel—Majority may render verdict.

1. Where an accused, charged with a capital offense, knowingly, intelligently, and voluntarily waives his right to a trial by jury pursuant to R. C. 2945.05 and Crim. R. 23 (A), and is subsequently tried before a three-judge panel, the panel may render a verdict upon a majority vote of its members pursuant to R. C. 2945.06.

2. An accused, charged with a capital offense, has not knowingly, intelligently, and voluntarily waived his right to a trial by jury where, prior to waiving this right, he is misinformed that the three-judge panel may render a verdict pursuant to R. C. 2945.06 only by unanimous vote.

(No. 77-1022—Decided May 17, 1978.)

APPEAL from the Court of Appeals for Butler County.

James U. Ruppert, (defendant herein), was indicted by the Butler County grand jury on March 30, 1976, in 11

counts for purposely, and with prior calculation and design, causing the deaths of Charity Ruppert, Teresa Lee Ruppert, Carol Diane Ruppert, Michael James Ruppert, David Scott Ruppert, John Anthony Ruppert, Alma Ruppert, Ann Delores Ruppert, Leonard Ruppert, Jr., Leonard Ruppert, III, and Thomas Frank Ruppert, in violation of R. C. 2903.01 (A), with the specification to each count that the offense was part of a course of conduct involving the purposeful killing of two or more persons contrary to R. C. 2929.04 (A) (5).

Defendant entered a plea of not guilty and not guilty by reason of insanity to each of the counts and specifications. On May 13, 1975, the trial court determined that defendant was sane and of sufficient soundness of mind to stand trial.

Accompanied by his co-counsel, Hugh Holbrock and H. J. Bressler, defendant waived his right to a jury trial in open court on June 6, 1975.

Trial commenced before a three-judge panel on June 16, 1975, and on July 3, 1975, a majority of the court found defendant guilty of each of the 11 counts of aggravated murder and specifications. The majority found further that defendant was sane at the time he committed the offense.

Unable to unanimously find that none of the mitigating circumstances set forth in R. C. 2929.04 (B) was established by a preponderance of the evidence at the mitigation hearing, the court sentenced defendant to life imprisonment for each of the 11 counts, the sentences to run consecutively.

Defendant subsequently filed a motion for new trial, later amended, in which he contended, in part, that because he was misinformed about the number of judges necessary to render a verdict on a three-judge panel, his waiver of a

jury trial was not knowingly, intelligently, or voluntarily made. In the alternative, defendant contended that he was denied a fair trial since the verdict was reached by a majority vote of the panel rather than by a unanimous vote.

On July 22, 1975, the three-judge panel conducted a hearing on defendant's motion for new trial based on the testimony and affidavits of James U. Ruppert and defense attorney Hugh D. Holbrock, and on the submitted affidavits of Judge Cramer (the judge who originally accepted appellee's jury waiver and who also sat on the three-judge panel which tried the cause), prosecutor John F. Holcomb, and defense attorney H. J. Bressler. The testimony and affidavits reflect that prior to the date of the trial, defense counsel informed their client that if his case were tried to a three-judge panel, a unanimous verdict would be required to find him guilty as charged.

Also, prior to trial, Judge Cramer indicated to the defense counsel that he agreed with this interpretation of the law.

When, on June 6, 1975, Ruppert appeared in open court before Judge Cramer to waive his right to trial by jury, the following colloquy took place between Ruppert and the judge:

"Q. [J. Cramer] Now, you understand that when you are tried by a jury which you are waiving, before you can be found guilty or not guilty of any one or all of the 11 counts, all 12 of the jurors must agree?

"A. [Ruppert] Yes, sir.

"Q. But where three judges hear the case as you have consented and asked to be done, just all three have to agree?

"A. Yes, sir.

"Q. You understand that?

"A. Yes, sir.

"Q. You also understand, do you, that if you have a jury that before they can find in accordance with your de-

fense that you were sane or insane at the time of the alleged commission of said offenses, all 12 of the jurors must agree. However, if three judges hear your case as you have requested to be done before the three judges can find that you were sane or insane at the time of the alleged commission of the offenses, all three must agree on that?

"A. Yes, sir.

"Q. I'm pointing this out to you, the difference between when the jury hears a case and three judges.

"A. Yes, sir.

"Q. And you wish to without any question, to waive your trial by jury is that right?

"A. Yes, sir.

"Q. Is there anything you want to ask the Court in reference to this? Anything you don't understand about the jury waiver?

"A. No, sir."

On June 16, 1975, immediately prior to commencement of the trial before the three-judge panel, a conference took place among all the counsel and judges participating in the cause. The subject of the three-judge panel and the number of judges necessary to render a verdict was discussed. Although there was disagreement among the members of the conference concerning the matter, a decision as to the proper rule of law was not made at that time. Apparently, Ruppert was never told that there were serious questions concerning the number of votes necessary to convict under a three-judge panel.*

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* Shortly, after trial commenced on June 16, 1975, Judge Cramer again questioned Ruppert concerning his jury waiver:

"Q. [J. Cramer] Alright, Mr. Ruppert, last week you appeared here in court with counsel and waived in writing your right to trial by jury and it was accepted at that time. We want to now make an inquiry of you if you are standing by and reaffirming that written waiver of

After hearing the testimony and reviewing the affidavits and evidence of record concerning the events surrounding the jury waiver, a majority of the trial court overruled defendant's motion for new trial on the basis that he must have decided to waive a jury trial not only because of his reliance on information furnished by defense counsel and the court concerning the unanimity of the three-judge panel in rendering a guilty verdict, but also because of several other important tactical considerations. The majority reasoned, *inter alia,* that defendant must have been informed by his counsel that in the sentencing stage of an aggravated murder trial tried by a three-judge panel a sentence of death requires the unanimity of three judges as compared with the decision of one judge in a jury trial.

On appeal, the Court of Appeals reversed the judgment and sentence of the trial court and remanded the cause for a new trial on the basis that defendant could not have knowingly, intelligently, and voluntarily waived his right to a

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trial by a jury and submit to be tried by the panel of three judges who are seated here?

"A. [Ruppert] Yes, sir.

"Q. You do not wish to withdraw your waiver of trial by jury?

"A. No, sir.

"Q. *And you reaffirm the fact, do you, that such waiver was executed in accordance with what we stated at the time you did execute it* that you were doing it voluntarily and knowingly and fully understanding all of your rights that you have under the Constitution of the United States and Ohio and the law of this state respecting your right to trial by jury having been fully explained to you by the Court as well as your counsel? Is that correct?

"A. Yes, sir.

"Q. And you are standing by that waiver and wish not to withdraw it at this time which you are permitted to do if you wish to and the jury will try this case?

"A. No, I want it to be as it is.

"Q. And it is and you want to stand by your waiver of trial by jury?

"A. Yes, sir." (Emphasis added.)

jury trial where he was misinformed about the number of judges necessary to convict on a three-judge panel.

The cause is now before this court upon the allowance of a motion and cross-motion for leave to appeal.

Mr. John F. Holcomb, prosecuting attorney, and *Mr. Daniel G. Eichel,* for appellant and cross-appellee.

Messrs, Holbrock, Jonson, Bressler & Houser, Mr. Hugh D. Holbrock and *Mr. H. J. Bressler,* for appellee and cross-appellant.

SWEENEY, J. The first issue confronting this court is whether an accused charged with an offense punishable by death who has waived his right to a trial by jury may be convicted only by a unanimous vote of the three-judge panel. R. C. 2945.06 clearly provides that in a criminal case involving the death penalty tried to a panel of three judges the "* * * judges or a majority of them may decide all questions of fact and law arising upon the trial, and render judgment accordingly."

Although the above portions of R. C. 2945.06 have never been repealed, it is contended that the provisions have been repealed by implication since under the new sentencing procedures set forth in R. C. 2929.03, it is provided that the death sentence may only be imposed by a three-judge panel when it unanimously finds that none of the mitigating circumstances listed in R. C. 2929.04 (B) have been established by a preponderance of the evidence. R. C. 2929.03 (E). It is reasoned that if a majority of the judges was empowered to enter a verdict of the guilt determining phase of the trial, then presumably, in this situation, there would be no need for a mitigation hearing, since the dissenting judge would prevent a unanimous finding with respect to the absence of any of the mitigating

circumstances. If it happened, upon conducting a mitigation hearing in such a situation, that the three-judge panel were to agree unanimously that none of the mitigating circumstances existed by a preponderance of the evidence, a totally unacceptable situation would result.

In support of the contention that R. C. 2945.06 has been repealed by implication is the committee comment to R. C. 2929.03 reflecting the belief that no matter whether the capital case is tried to a twelve-member jury or a three-judge panel, the verdict must be unanimous.

Repeals by implication are disfavored in the law. *State, ex rel. Toerner,* v. *Common Pleas Court* (1971), 28 Ohio St. 2d 213, 217; *Cincinnati* v. *Thomas Soft Ice Cream* (1977), 52 Ohio St. 2d 76, 79. Only where the provisions of the two statutes are irreconcilable by any means of interpretation (*In re Hesse* [1915], 93 Ohio St. 230, 234) or are so repugnant to or contradictory with each other as to evidence an intent on the part of the General Assembly to change the statutory law will this court conclude that the earlier statute has been superseded by the later statute, and therefore of no force and effect. *Goff* v. *Gates* (1912), 87 Ohio St. 142; *Henrich* v. *Hoffman* (1947), 148 Ohio St. 23, 26.

For example, in *State* v. *Miller* (1977), 49 Ohio St. 2d 198, at 204, this court was confronted with the issue of whether that portion of R. C. 2945.06 granting the court the power to reduce punishment for capital offenses to life imprisonment was still valid in light of the newly enacted sentencing provisions of R. C. 2929.03 and 2929.04. We held that the former provision, although not formally repealed, was superseded. Clearly, the provision granting to the court the power of extending mercy in the sentencing phase of an aggrevated murder trial was in direct conflict with newly established sentencing procedures.

However, those portions of R. C. 2945.06 under consideration in this cause are not in direct conflict with any of the newly-enacted provisions of the Ohio Criminal Code (Am . Sub. H. B. No. 511, 134 Ohio Laws 1866). Clearly, R. C. 2929.03 (E), requiring unanimity of the panel of three judges in imposing the death sentence, and R. C. 2945.06, allowing a majority of the panel to render a guilty verdict, deal with separate phases of the aggravated murder trial.

Nor is this court convinced that in some way R. C. 2945.06 and 2929.03 are so repugnant to or inconsistent with each other as to evidence an intent on the part of the General Assembly to repeal the former section, R. C. 2945.-06.

An additional consideration convinces this court that the General Assembly never intended that the requirements of unanimity of the three-judge panel under R. C. 2929.03 (E) supersede the provisions of R. C. 2945.06 relating to the prescribed number of votes necessary to convict.

The power to hear and try criminal cases in which the accused has waived his right to a jury trial is specifically granted judges under R. C. 2945.06. *State* v. *Smith* (1931), 123 Ohio St. 237, 241 (decided under former G. C. 13442-5). Under this section, any judge of the court may hear the case so long as it does not involve an offense punishable by death. If an offense is punishable by death, then only a three-judge panel, composed of specifically designated members of the court, may hear the case and render a verdict upon a majority vote of its members. Clearly, these jurisdictional provisions have not been superseded by subsequent statutes having nothing to do with the authority of judges to try criminal cases without a jury.

Finally, the court is aware of language found in *State* v. *Bell* (1976), 48 Ohio St. 2d 270, 276, indicating that in a

case tried to a three-judge panel, the defendant need only convince one of the three judges "of the absence of evidence of guilt beyond a reasonable doubt." However, this statement did not constitute a holding in the case, but rather served as part of an analogy to support the proposition that a defendant under R. C. 2929.03 (C) (1) (2) and (E) is not coerced or compelled in waiving his right to a jury trial. Our holding in this case in no way weakens the analogy made in *Bell, supra.*

This court, having determined that the three-judge panel may render a guilty verdict in an aggravated murder trial by a majority vote of its members, is confronted with the issue of whether application of majority rule in the first phase of an aggravated murder trial is in some way constitutionally defective.

In *State* v. *Robbins* (1964), 176 Ohio St. 362, this court was presented with a similar issue in upholding the constitutionality of former R. C. 2945.07 (repealed under the new Ohio Criminal Code). That section provided that in felony cases other than capital cases, an accused could waive his right to a trial by jury and file a request with the court to be tried before a three-judge panel, and further provided that if the request were granted, a majority of the panel could determine the guilt or innocence of the accused.

Although *Robbins, supra,* involved a non-capital felony case tried to a three-judge panel under former R. C. 2945.-07, the court finds the reasons given in that case for upholding the constitutionality of less-than-unanimous verdicts by a three-judge panel applicable in this cause.

As noted in *Robbins, supra,* at pages 363-364, a defendant in a criminal case may waive his constitutional right to a jury trial or to a jury of 12. If a defendant may waive this right, he may also waive his right to have a unanimous verdict. The right to a unanimous verdict at-

taches to the right of a jury trial, and as the latter may be waived, so may the former.

The court, as in *Robbins,* finds nothing inherently unlawful in permitting a three-judge panel to render a verdict based on a majority vote of its members. Requiring less than a unanimous verdict in a non-jury trial in no way lessens the prosecution's burden of proving the accused guilty of the charge beyond a reasonable doubt. *Robbins, supra,* at pages 364-365. See, also, *Johnson* v. *Louisiana* (1972), 406 U.S. 356, 360-362. Furthermore, the requirement of unanimity of the triers of fact in a criminal trial has historically been associated with a jury trial and not a trial before the court. *Patton* v. *United States* (1930), 281 U. S. 276, 288; *Apodaca* v. *Oregon* (1972), 406 U. S. 404. In short, nowhere can this court find support for the proposition that unanimity of the three-judge panel is constitutionally mandated where an accused has waived his right to a jury trial in a capital case.

The court concludes, therefore, that the provision of R. C. 2945.06 empowering a majority of the three-judge panel to render a guilty verdict in a capital case is constitutional.

The final issue confronting this court is whether the accused knowingly, intelligently and voluntarily waived his right to a jury trial under Crim. R. 23. As noted in *Patton, supra,* at page 312, trial by jury is the normal, if not preferable, mode of disposing of issues of fact in criminal cases and the right must be jealously preserved. *See Estrada* v. *United States* (C. A. 7, 1972), 457 F. 2d 255 It "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Duncan* v. *Louisiana* (1968), 391 U. S. 145, 155. Therefore, the court must insure that the accused's decision to waive such right is made with a sufficient awareness of the relevant circum-

stances and likely consequences of his waiver. *Brady* v. *United States* (1970), 397 U. S. 742, 748; *State* v. *Sharp* (Mo. 1976), 533 S. W. 2d 601; *State* v. *McKay* (1977), 280 Md. 558, 375 A. 2d 228. Whether or not there is a valid waiver depends on the unique circumstances of each case. *Adams* v. *United States* (1942), 317 U. S. 269, 278.

In the instant cause, Ruppert was misinformed that only a unanimous verdict of a three-judge panel could convict him of the offenses if he were to waive his right to a jury trial. Clearly, the defendant was not informed of an important consequence of his decision to waive a jury trial. As observed previously, by waiving his right to a jury trial, Ruppert not only was foregoing the right to be tried before a panel of 12 jurors, but also was waiving his right to a unanimous verdict. Irrespective of whether other important tactical considerations entered into his decision to waive a jury trial, Ruppert could not have knowingly, voluntarily and intelligently waived this right where he was misinformed as to the consequences of his decision in being tried before the court.

In conclusion, because this court finds that under R. C. 2945.06 only two of the three judges need concur in determining the guilt or innocence of the accused in an aggravated murder trial tried before the court, and because Ruppert was misinformed of this important consequence resulting from his jury waiver, the judgment of the Court of Appeals reversing the conviction and sentence of Ruppert and remanding the cause for new trial is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, STEPHENSON, P. BROWN and LOCHER, JJ., concur.

CELEBREZZE, J., concurs in the judgment.

STEPHENSON, J., of the Fourth Appellate District, sitting for W. BROWN, J.

APPENDIX B

Opinion of the Court of Appeals, Butler County, First Appellate District of Ohio, August 3, 1977.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
BUTLER COUNTY, OHIO

NO. CA75-08-0067

STATE OF OHIO,
Plaintiff-Appellee,

v.

JAMES U. RUPPERT,
Defendant-Appellant.

DECISION

(Filed August 3, 1977)

Mr. John F. Holcomb, Prosecuting Attorney, 310 Rentschler Building, Hamilton, Ohio 45011, for Plaintiff-Appellee,

Messrs. Holbrock, Jonson, Bressler & Houser, Hugh D. Holbrock and H. J. Bressler of counsel, 315 South Monument Avenue, Hamilton, Ohio 45011, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the

transcript of the docket, journal entries and original papers from the Court of Common Pleas of Butler County, Ohio, the transcript of the proceedings, the assignments of error, the briefs and the arguments of counsel.

Ruppert appeals from his conviction by two members of a three-judge court convened under R. C. 2945.06 after he had waived a jury trial. By that same majority, he was sentenced to eleven consecutive life terms, one for each of eleven murders. He assigns eight errors, the second of which we find well taken. We reverse and remand for a new trial.

The record discloses that Ruppert was indicted for eleven aggravated murders with specifications. The evidence that he killed his mother, his brother, his brother's wife and their eight children (aged four to seventeen years) was overwhelming and not controverted. Ruppert's defense was that he was insane. The State replied that he was sane, that he was in need of money, and that he disposed of his next of kin out of jealousy and hatred and greed. The State's theory of the case was that he stood to inherit $300,000.00 as the sole survivor, if he could beat the murder charges by being found not guilty by reason of insanity and then obtain release from the hospital for the criminally insane once he was "restored to reason."

Additional facts will be disclosed in connection with the assignment of error which will be considered in the same order they were presented.

I.

> The Court erred in holding that the defendant could be convicted by a majority of the three-judge panel and in overruling a motion for a new trial on that basis since a verdict of a three-judge panel must be unanimous.

This assignment presents two issues: (A) whether R. C. 2945.06 was repealed by implication through the enactment of the 1974 Ohio Criminal Code; and (B) if not, whether the provisions of that section for a majority decision of all questions of fact and law violate the constitutional requirements for equal protection of law. That section reads in full as follows:

> § 2945.06. Jurisdiction of judge when jury trial is waived; three-judge court.
>
> In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which such cause is pending shall proceed to hear, try, and determine such cause in accordance with the rules and in like manner as if such cause were being tried before a jury. *If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges,* consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of said court, and in case there is neither presiding judge nor chief justice, by the chief justice of the Supreme Court. *Such judges or a majority of them may decide all questions of fact and law arising upon the trial, and render judgment accordingly.* If the accused pleads guilty of murder in the first degree, a court composed of three judges shall examine the witnesses, determine the degree of crime, and pronounce sentence accordingly. In rendering judgment of conviction of an offense punishable by death upon plea of guilty, or after trial by the court without the intervention of a jury, the court may extend mercy and reduce the punishment for such offense to life imprisonment in like manner as upon recommendation of mercy by a jury. If in the composition of said court it is necessary that a judge from another county be assigned by the chief justice, such judge shall be

compensated for his services as provided by section 141.07 of the Revised Code. (Emphasis supplied.)

A.

We conclude that this section was not repealed by implication. Claiming the contrary, Ruppert points to the "Committee Comment" to R. C. 2929.03, one of three sections of the 1974 Criminal Code providing penalties for aggravated murder and murder. These new sections require a two-step procedure when the charge is for aggravated murder with specifications; the first step is the determination of guilt, and the second is the determination of penalty (that is, whether the death penalty shall be imposed). The third paragraph of the "Committee Comment" states that the procedure is essentially the same in the first step of a capital case whether it is tried by a jury or a three-judge panel and concludes by saying that the three-judge panel's verdict must be unanimous.[1] This argument is not persuasive, because a report of the Legislative Service Commission may not be used to give meaning to a legislative enactment other than that which is clearly expressed by the General Assembly. *Cleveland Trust Co.* v. *Eaton* (1970), 21 Ohio St. 2d 129, at 138. Such comments are helpful, *Weiss* v. *Porterfield* (1971), 27 Ohio St. 2d 117, but not even the sponsor's opinion is entitled to conclusive

[1] The pertinent part of the "Committee Comment" (actually the comments of the Legislative Service Commission, an organization serving the General Assembly, and not a committee of either house) states as follows:

> "The procedure is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules of evidence apply, the specification must be proved beyond a reasonable doubt, and the panel's verdict must be unanimous."

weight. We must look to the legislative language itself. No statement as to the meaning of a statute is conclusive unless it comes from the legislature itself. *State* v. *Edwards* (2d Dist. 1976), 50 Ohio App. 2d 63. House Bill No. 511, enacting the new Criminal Code, expressly repealed R. C. 2945.07 (providing for an optional three-judge court in noncapital felony cases) but it left both R. C. 2945.05 and 2945.06 in full force and effect, thus expressing an intent, in our judgment, that the three-judge court shall act by majority vote in the first step of a capital trial.

Defendant also points to a statement made in *State* v. *Bell* (1976), 48 Ohio St. 2d 270, which seems to equate the unanimity required of a jury for a finding of guilt with a required unanimity for a three-judge panel.[2] However, we are persuaded, after careful and respectful analysis, that this statement is *obiter dictum*. The issue being discussed in *Bell* was whether the provisions of R. C. 2929.04 (B), requiring unanimity of the three judges before the death penalty can be imposed, so outweigh the advantages of a trial by jury that the new provisions have the practical effect of denying an accused murderer a trial by jury. After a jury trial, the trial judge sitting alone makes the penalty decision. The Supreme Court decided that the advantages and disadvantages of going to a jury or going to a three-judge panel are so balanced that the new law is not im-

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[2] The full paragraph referred to reads as follows, beginning at p. 275:

> "Although appellant asserts that there is a greater possibility of convincing one of three judges on a panel of a mitigating factor than one judge alone, by the same logic, there is also a greater possibility of convincing one or more of 12 jurors of the absence of evidence of guilt beyond a reasonable doubt than so convincing one of three judges. If the first consideration inclines against a jury trial, then the latter inclines toward one. The balance struck by these competing considerations is for the judgment of the defendant and competent trial counsel."

permissibly weighted against jury trial. The court did not decide in *Bell* that the three judges must be unanimous in all decisions of fact and law in the first trial phase of a capital murder case.

We note that in *State* v. *Miller* (1977), 49 Ohio St. 2d 198, at 204, the court held that those provisions of R. C. 2945.06 which permit a three-judge court to extend mercy and reduce the death penalty to life imprisonment, although not expressly repealed, have in effect been declared unconstitutional by *State* v. *Leigh* (1972), 31 Ohio St. 2d 97 and have been superseded by R. C. 2929.03 and 2929.04. This leaves the balance of the section in full force and effect.

B.

We are not persuaded that the provisions for majority rule in the guilt phase of a capital case violate the constitutional requirements of equal protection and due process. The Supreme Court of the United States has decided that there is nothing unconstitutional in providing for majority verdicts in criminal cases. *Apodaca* v. *Oregon* (1972), 406 U.S. 404, and *Johnson* v. *Louisiana* (1972), 406 U.S. 356.

Further, the Ohio Supreme Court has held that the provisions of R. C. 2945.07 (now repealed) whereby the defendant could waive a jury and have his noncapital felony case tried to three judges were constitutional. The defendant can waive any and all of his rights granted by the Constitution, including his right to a jury, and the provisions for majority rule in a three-judge court are both reasonable and not inconsistent with historical and constitutional requirements. *State* v. *Robbins* (1964), 176 Ohio St. 362. All three cases involved noncapital offenses; nevertheless, we believe that they are applicable to the first phase of a capital case.

The principle of unanimity is preserved in the second and most crucial step, because the judges cannot impose the death penalty unless all three agree.

We find that the provision in R. C. 2945.06 for the trial of a capital offense before a three-judge panel, which may decide by majority vote all the questions of fact and law in the trial, is a reasonable and valid alternative for the determination of guilt. All accused persons who elect to waive the jury and go to a three-judge court are provided with the same procedure. There is equal protection of law. The first assignment of error is not well taken.

II.

> The court erred in failing to grant defendant a new trial on the basis that his jury waiver was not knowing, voluntary and intelligent since he had been informed by counsel and the presiding judge that the panel's verdict must be unanimous.

During a pre-trial hearing on jury waiver, the presiding judge told Ruppert that the three-judge panel must be unanimous on the issue of guilt and the issue of insanity at the time of the offense.[3] The defendant clearly understood

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[3] The following exchange took place during the hearing on jury waiver:

"Q. (PRESIDING JUDGE) Now, you understand that when you are tried by a jury which you are waiving, before you can be found guilty or not guilty of any one or all of the 11 counts, all 12 of the jurors must agree?

A. (RUPPERT) Yes, sir.

Q. But where three judges hear the case as you have consented and asked to be done, just all three have to agree?

A. Yes, sir.

Q. You understand that?

A. Yes, sir.

Q. You also understand, do you, that if you have a jury before

these statements, and nothing in the record shows that he was ever advised of the contrary. On the first day of the trial, before proceeding with any other matter, the presiding judge brought Ruppert before the bench with his counsel to determine whether he reaffirmed his jury waiver in accordance with what the court had stated at the time the waiver was first presented. The defendant stated, "I want it to be as it is."[4]

The record shows that the presiding judge expressed his bona fide conclusion about the state of the law without intending to mislead Ruppert or his counsel, and without ulterior motive. He maintained that position throughout the trial.

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they can find in accordance with your defense that you were sane or insane at the time of the alleged commission of said offenses, all 12 of the jurors must agree. However, if three judges hear your case as you have requested to be done before the three judges can find that you were sane or insane at the time of the alleged commission of the offenses, all three must agree on that?

A. Yes, sir.

Q. I'm pointing this out to you, the difference between when the jury hears a case and three judges.

A. Yes, sir.

Q. And you wish to without any question, to waive your trial by jury, is that right?

A. Yes, sir."

[4] Our decision is grounded solely on what the judge told the defendant in open court, even though the record tends to establish other facts: that the presiding judge agree [*sic*] with defense counsel in an informal conference in chambers without the presence of the defendant or the prosecutor that unanimity was required for a finding of guilty; that in a subsequent informal conference in chambers on the first day of the trial, before the three judges proceeded into the courtroom, defense counsel raised the question again and were advised by one of the other judges, "We will cross that bridge when we get to it"; that neither the prosecutor nor any of his assistants raised any question or noted any exception to this ruling on the record; and that defense counsel's advice to defendant was that unanimity was required for findings of guilt. In the light of our conclusion, these facts are not material to disposition of the second assignment of error.

The record also discloses that the other two judges did not know until after the trial that the presiding judge had told the defendant the three judges had to be unanimous on guilt and on insanity. They were not present at the waiver hearing. No judge knowingly or intentionally mislead Ruppert about the question of majority vote.

The issue is one of first impression. Experienced person in all branches of the legal profession could reasonably come to opposite conclusions. Two judges decided that they could act under R. C. 2945.06, and they found Ruppert guilty of all eleven murder counts and all eleven specifications, imposed the consecutive life sentences, and denied the motion for a new trial.

We conclude that error prejudicial to the defendant was committed because his waiver of jury trial was not made knowingly and voluntarily. He knew the decisions about guilt and insanity would not be decided by a jury, but he was not aware that under the law a majority of the panel could find him guilty. What he consented to was a trial before a panel which had to be unanimous in all guilt findings. What he got was a trial where a majority of two could find him guilty, but he was not made aware of that until after the panel had made its final determination of guilt.

Ruppert's jury waiver was not given with full understanding of a fundamental factor in his trial. The waiver was not "knowing" because he did not, at the time, know that two judges could rule him guilty. Since it was not knowing, the waiver could not be voluntary.

We conclude this case is governed by established principles of fairness. In *Henderson* v. *Morgan* (1976), 426 U.S. 637, the defendant's defense to a charge of murder might well have been that he had no intent to kill. He pled guilty to second degree murder, but the court failed to advise him that in so doing he admitted he intended to

cause the death. The Supreme Court vacated the judgment on the grounds that the plea was not knowingly and voluntarily made. In *State* v. *Sharp* (Mo. 1976), 533 S.W. 2d 601, the defendant's waiver of jury trial was made on the mistaken expectation that he could withdraw his waiver if at the conclusion of the trial procedure the judge refused to grant probation. The defendant expected a procedure regularly followed by that judge, whereas the judge approached the peculiarities of that case with an entirely different intention. In *Commonwealth* v. *Hooks* (1973), 450 Pa. 562, 301 A.2d 827, a jury waiver was ruled invalid when the defendant, even though he had said he was willing to sign the waiver, and did sign it, stated that he really did not understand "some of the things."

In the instant case, the essential unfairness is a demonstrable reality and not a matter of speculation. See *Adams* v. *U.S. ex rel. McCann* (1942), 317 U.S. 269, at 281.

The second assignment of error is well taken.

III.

The court erred in receiving into evidence various exhibits which individually and in total prejudiced the defendant and deprived him of a fair trial.

By this blanket assignment defendant claims error in the admission of 103 of the State's exhibits and we are required by App. R. 12 (A) to pass upon this assigned error in writing. These exhibits were offered to substantiate the State's position that Ruppert murdered his family by prior calculation and design (i.e., to obtain their property). Five of them were not received by the court (Exhibits 182 188, 194, 194 (A) and 200), and four were missing from the record (Exhibits 160, 161, 162 and 201). We find no error in the admission of 73 exhibits attacked by this

assignment of error, but we find error in admitting 21 exhibits, as set forth in the succeeding paragraphs.

It was error to receive four handwritten "loan agreements" (Exhibits 95, 96, 97 and 98), because the defendant's signature as a borrower from his mother or his brother was not identified, because they were all past due on the day of the killings and because there was a total absence of evidence as to their current statue (whether still outstanding, or paid in part or in full).

The court erred in admitting the signature and ledger cards for the defendant's purported savings account at Columbia Federal Savings and Loan Association of Hamilton (Exhibits 103 and 104), because the evidence of identity and authentication was insufficient to meet the requirements of R. C. 2317.40, the Uniform Business Records as Evidence Act.[5] The signature was not identified as having

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[5] We conclude that R. C. 2317.40 can properly be used for the admission of business records in a criminal case, provided that the defendant's constitutional rights to confront the witnesses against him and to cross-examine them are not violated. In the instant case the purpose for which the business records were offered was to establish the fact that the decedent's brother and his family had property that, presumably, would be inherited by defendant if he were the sole survivor of the family. While such evidence relates to the issues of sanity and purpose, we conclude that the rights of confrontation and cross-examination do not prevail. In *State* v. *Kehn* (1977), 50 Ohio St. 2d 11, the Supreme Court held that deposit slips properly qualified under R. C. 2317.40 were admissible for the purpose of showing the deposit of a payoff in coin to the defendant police officers following the burglary of a vending machine company. It all depends upon the purpose for which the exhibits are offered. If they are offered to connect the defendant directly to the commission of the crime, then they must be proved by persons with personal knowledge who are subject to cross-examination. *United States* v. *Lipscomb* (5th Cir. 1970), 435 F. 2d 795, *cert. den.* 401 U.S. 980, *reh. den.* 402 U.S. 966; *State* v. *Matousek* (1970), 287 Minn. 344, 178 N.W.2d 604. The rights of confrontation and cross-examination prevail in the introduction of the record of a physical examination of a rape victim where the defendant claims he never had sexual intercourse with the girl. *State* v. *Tims* (1967), 9 Ohio St. 2d 136. *State* v. *Phillips* (6th Dist. 1951), 90 Ohio App. 44.

been made by the defendant, the address in these records was not shown to be the defendant's address, and there was no information within the four corners of these documents that connected them with the defendant.

The signature cards for ten savings accounts at West Side Federal Saving and Loan Association of Hamilton, Ohio, in the names of the defendant's brother and other members of his family (Exhibits 108 through 117) also should not have been admitted over defendant's objection, because the State failed to comply with the fundamental specifics of R. C. 2317.40. The evidence was relevant to the issues of sanity and purpose; the witness, an assistant vice president of the Association, can be deemed to be a person who "supervised" the making of the record. *City Products Corp.* v. *Board of Liquor Control* (10th Dist. 1958), 79 Ohio L. Abs. 481, 156 N.E.2d 347. However, the witness failed to testify as to the mode and time of preparation, and the record fails to show compliance with the mandatory requirements of R. C. 2317.40.[6]

In the instant case, we conclude that R. C. 2317.40 may be used to prove ownership of property (whether belonging to the defendant or the victims) when that ownership itself is not one of the essential elements of the offense, even though this procedure eliminates defendant's rights of confrontation and cross-examination. However, the specific requirements of R. C. 2317.40 as to identity and authentication are mandatory.

[6] After the witness, Donald A. Schwab, read from the ten cards the signatures, the dates and the account numbers, and stated the current balances, the following took place:

> "Q. All right, now Mr. Schawab(sic), have the documents which have been marked for identification as State's Exhibits 108, through 117, been kept and maintained by West Side Federal as business records in the normal course of doing business?
>
> A. That's right.
>
> JUDGE CRAMER: When did you say Leonard and Alma as custodians' account was opened?

The records from both savings and loan associations failed to meet the first mandatory requirement for admissibility. As stated in *Dillow* v. *Young* (10th Dist. 1965), 3 Ohio App. 2d 110, reversed on other grounds, (1966), 6 Ohio St. 2d 221, there are two major requirements for admissibility under R. C. 2317.40. First, the reliability of the document must be demonstrated: (1) the custodian or person who supervised the making of the record must testify (2) to its identity, (3) the mode of its preparation, and (4) if it was made in the regular course of business, at or near the time of the act or events it tends to establish. Compare McCormick, *Evidence* 722, § 308 et. seq. (2d ed. 1972). The second major test for admissibility can be met *only* after the business record has been "identified and authenticated in the manner specified in the statute itself." *Weis* v. *Weis* (1947), 147 Ohio St. 416, at 424. The second requirement is that the evidence asserted in the business records shall be admissible under the general rules of evidence. While the trial court has discretion under the statute to determine reliability (Whether the sources of information and the method and time of preparation were such as to justify admission), the total absence of any evidence upon which such discretion might be exercised is cause for error. Compare *In re Daniels' Estate* (1949), 185 Ore. 642, 205 P.2d 167.

In contrast, the witness who identified the signature card and ledger sheets from the Miami Savings & Loan

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A. March 31, 1975 — wait a minute, January 6th, 1973.

MR. FISCHER: Your witness.

MR. BRESSLER: I have no questions.

Witness excused.

MR. FISCHER: If the court please, we will offer as exhibits State's 108 through 117.

MR. HOLBROCK: Object.

JUDGE CRAMER: Overruled, we'll admit them."

Company of Miamitown, Ohio, relating to a joint account in the name of the brother and his wife, identified their signatures. His testimony fulfilled the mandatory requirements of the Uniform Business Record As Evidence Act.

Copies of title documents and mortgage accounts relating to property owned by the brother and his wife (Exhibits 128 and 129) were improperly admitted because not properly authenticated. The title documents were not certified by the Recorder, and the attorney for the estates could not qualify as either the custodian or the person who supervised the making of the mortgage accounts.

The following documents were improperly admitted because not relevant to the issues in the case: the rider to a policy of insurance (Exhibit 163); defendant's miscellaneous papers and documents (Exhibit 196); and a congratulatory card on high school graduation addressed to "Jimmy" (Exhibit 199).

However, we conclude that the errors noted above are not reversible errors, because the admission of these documents neither prejudiced the defendant under Crim. R. 33 (E) (3) nor affected his substantial rights under Crim. R. 52 (A). The 73 exhibits which were admitted without error provide credible evidence of probative value to demonstrate that the deceased members of defendant's family had property of recognizable value. The elimination of the matters sought to be established by the excluded exhibits leaves behind substantial other evidence tending to prove the State's theory of the case. We cannot say the defendant was prejudiced by the admission of the 21 exhibits discussed above.

The third assignment of error is not well taken.

IV.

The court erred in permitting in evidence the opinion testimony of Louis Hofstadter as to the law of the State of Ohio.

Louis Hofstadter's testimony concerned the devolution of property when there is but one survivor in a family; in other words, how the property of the eleven deceased person would descend under Ohio law. This testimony was in the nature of surplusage because under Criminal Rule 27 (which incorporates Civil Rule 44.1), the trial court must taken [*sic*] judicial notice of the decisional, constitutional and public statutory law of this State.

Appellant fails to point out, and we do not find, any point of law stated by Mr. Hofstadter which was erroneous, or otherwise to the prejudice of Ruppert.

The fourth assignment of error has no merit.

V.

The court erred in admitting the opinions of eighteen (18) lay witnesses as to the sanity of James Ruppert.

It is well settled in Ohio that lay witnesses may give their opinions of the accused's sanity. *Clark* v. *State* (1843), 12 Ohio 483.

Headnote 10 of *State* v. *Miller* (C.P. Seneca County 1895), 5 Ohio Dec. 703, aff'd without opinion (1896), 55 Ohio St. 685 reads as follows:

> "Non-expert witnesses, called upon to give their opinions as to the sanity or insanity of accused, are required to state facts upon which such conclusions are based, and are entitled to much, little or no weight according to witnesses' familarity with accused, their

means of knowing and observing him, as well as their manifest intelligence, and fairness or unfairness toward him."

In the instant case, each lay witness who expressed an opinion about defendant's sanity first recited sufficient acquaintanceship with defendant to form a basis for an opinion. This basis was not destroyed, as a matter of law, by cross-examination. The evidence was admissible, and the weight attributable thereto lay in the sole province of the panel.

We overrule defendant's fifth assignment of error.

VI.

The court erred in considering the testimony of Wanda Bishop and in overruling defendant's motion made after verdict for a new trial on the basis that the testimony of Wanda Bishop was not believable and was perjured.

Wanda Bishop testified that she was in love with James Ruppert and had spent every evening with him between October 30, 1974 and March 29, 1975. Five evenings a week they could be found at the 19th Hole Cocktail Lounge. On March 29, 1975, Wanda said she spent the evening with Ruppert at the 19th Hole. He told her that his mother had said that if he could drink seven days a week in a bar, he could afford to help pay the rent or move out. Wanda further testified that defendant left the 19th Hole at around 11:30 P.M., saying he had a problem he was going to take care of then and there. When he returned 30 minutes later, Wanda asked if he had taken care of his problem, to which he replied, "No, not yet."

The prosecution relied on Wanda's testimony to indicate that there had been trouble between Ruppert and his mother and to indicate prior calculation and design on Ruppert's part.

While only minimally corroborated and largely contradicted by other witnesses, Wanda's testimony was internally consistent. It is well settled that the trier of facts, whether judge or jury, is the judge of the credibility of witnesses and of the weight to be attached to their testimony. *State* v. *Cox* (Ohio App. 1946), 70 N.E.2d 394. See also *Butzman* v. *U.S.* (6th Cir. 1953), 205 F.2d 343, *cert. den.* 346 U.S. 828. We do not believe that this witness has been discredited so completely that an appellate court must intervene on the ground that "the trier of the facts manifestly lost its way, or became confused, or responded to bias or prejudice." *State* v. *Culp* (3rd Dist. 1971), 32 Ohio App. 2d 39, at 50

We have considered the case of *State* v. *Milam* (8th Dist. 1959), 108 Ohio App. 254, cited by the defendant, in which the appellate court found that the testimony of certain prosecution witnesses was entitled to no weight. We cannot ascribe great precedential value to that decision, for two reasons: (1) Three opinions were written ("majority", concurring and dissenting opinions) and only the "marjority" opinion discards the testimony of the witness because it flew in the face of all other evidence; and (2) That case has never been cited, nor does it appear to stand, for the proposition that an appellate court may declare a witness's testimony totally unworthy of belief and entitled to no weight, in the absence of a showing that the fact finder lost its way or was confused, biased or prejudiced.

Finding no solid ground from which to reject Wanda Bishop's testimony as a matter of law, we conclude that the sixth assignment of error has no merit.

VII.

> The court erred in admitting the documents, in admitting the testimony of lay witnesses, as to sanity, in admitting the testimony of Louis Hofstadter, and in admitting the testimony of Wanda Bishop, and these admission had a cumulative effect of denying defendant every semblance of due process of law and equal protection of law to such an extent that his conviction cannot stand.

This assignment of error is a reprise of the preceding four assignments. Looking back over those four, the defendant claims that the cumulative effect of receiving in evidence the documents and the testimony attacked in those four assignments is to deny defendant due process, equal protection, and a fair trial. Rather than assuming that defendant intends this assignment of error to be a general catch-all, we will consider it to raise the issue of whether Ruppert had a fair trial when these exhibits and this testimony were received into evidence, even though it was not reversible error to have received any one of the four catgories of evidence. We proceed on this basis, because, if any one of those four preceding assignments had been found well taken, then the seventh assignment of error would be repetitious surplusage. We are willing to examine the cumulative effect of several actions by the trial court, no one of which constituted reversible error by itself.

Viewing the record as a whole, we conclude that the cumulative effect of the four portions of the evidence attacked by this seventh assignment of error is not sufficient to rise to the level of reversible error. We found error in the admission of 21 out of 94 documents but held that error to be harmless. Considering that finding together with the "largely impeached" testimony of Wanda Bishop,

the "unnecessary" testimony of Louis Hofstadter and the opinions of the lay witnesses as to Ruppert's sanity, we cannot say that established principles of due process and fair trial have been violated. This was a hotly contested trial skillfully waged by counsel, with a great deal of evidence on both sides of all determinative issues. The court did not err in receiving relevant evidence; that is, evidence having any tendency to make the existence of any fact that was of consequence to the determination of the issues more probable or less probable than it would have been without the evidence. We find no error.

The seventh assignment of error is not well taken.

VIII.

> The judgment and conviction of the defendant-appellant is against the manifest weight of the evidence and contrary to law, and the court thus erred in refusing to acquit defendant and also erred in refusing to either acquit the defendant or grant his motion for a new trial.

The issue presented is whether the evidence against Ruppert was so insufficient as to require either his acquittal or a finding of not guilty by reason of insanity. The focus is on his mental state at the time of the offense — whether he acted purposely and with prior calculation and design, or was insane. A person is insane when disease or other defect of his mind has so impaired his reason that at the time of the criminal act with which he is charged, *either* he did not know that such act was wrong *or* he did not have the ability to refrain from doing that act. *State* v. *Staten* (1969), 18 Ohio St. 2d 13.

Ruppert was examined by twelve mental experts: nine psychiatrists, of whom six testified for Ruppert and three for the State; and three psychologists, of whom two testified

for Ruppert and one for the State. Opinions of the experts who testified for Ruppert are in clear conflict with those who testified against him and all four of those against him stated that in their respective opinions, he knew the act was wrong and he had the ability to refrain from doing it. All of the defense experts stated that he could not refrain from doing the wrong, but some of these experts said that he knew it was wrong.

This state of the record raises in classic form the type of factual question which has traditionally resided in the sole province of the trier of facts. We have examined the testimony of each of these twelve experts, and construing the State's evidence most favorably to defendant,[7] we cannot say that as a matter of law the evidence was insufficient to sustain the conviction or that the judgment is against the manifest weight of the evidence.

Finally, our review of the entire record discloses that the judgment and conviction of Ruppert were not against the manifest weight of the evidence.

The eighth assignment of error is not well taken.

The second assignment of error being well taken, we reverse and remand for a new trial.

BETTMAN, P. J., CASTLE and BLACK, J. J.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

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[7] In construing the evidence most favorably to defendant, we find that the value of the expert opinion of Dr. D. A. Thomas was largely destroyed by extensive cross-examination. Assigning little or no weight to that testimony, we nevertheless find that there is credible evidence of probative value in the testimony of the three other State experts sufficient to raise a factual question for the sole consideration of the panel.

APPENDIX C

Rulings of the Court of Common Pleas, Butler County, Ohio, July 22, 1975. (Majority and dissenting opinions, Reproduced from Trial Transcript pages 1151-1157.)

Judge Marrs: Let the record show that the Court has listened to the arguments of respective counsel, discussed the merits initially in chambers, have perused the respective affidavits and after the conclusion of arguments again conferred. The majority of the Court would overrule the motion for a new trial. The basis for the overruling of the new trial, the majority of the Court would find that the defendant did knowingly and intelligently understand advice of counsel and that the considerations in making a determination to waive a jury, were not solely based on whether or not a Court could come to a unanimous conclusion. There were many other considerations that must have been considered. Now, obviously, in trying a matter to the Court long trial experience of counsel and certainly of the panel itself, its obvious to anyone if a matter is tried to a jury and 12 people would have to be convinced beyond a reasonable doubt of each and every essential element of the offense charged, its much more difficult to get more, 12 people, to unanimously agree upon a verdict than what it would be for three.

When we further look at the statutes concerning the penalties involved we find that if the matter is taken to a jury and where the death sentence is involved, then it only takes one judge to declare the penalty. That one judge must take into consideration before the death penalty can be given, three separate findings that these con-

ditions do not exist. When the matter is taken to a three-judge panel and a decision is arrived at, there is specifically spelled out in the law that it takes all three or unanimously they must agree that the three conditions have not been established before the death penalty can be concluded.

Now in the instant case, there were two defenses raised: One, not guilty; the second, not guilty by reason of insanity. Not guilty by reason of insanity, much evidence of course was established in the course of the trial going to that defense. Now obviously if that defense is weighed and the weight of the — or the evidence offered to that defense 12 people certainly could be less likely to agree than a three-judge panel. So its immediately to the defendant's advantage at that point to waive the jury and try it to a three-judge panel. Likewise, it is to the defendant's advantage to try it to a three-judge panel when the death penalty is involved (as in this case) because there again, before the death penalty could be inflicted it requires unanimity of the three judges to the point that none of the circumstances of: Did the victim induce the crime? Was it done under coercion or strong feelings of emotion or (3) Was there a psychosis present? And, as in this case, the wisdom of waiving a jury was brought out by the panel's verdict on that point, being 2 to 1. No unanimity and, therefore, the death penalty was precluded. Now obviously these points that had to be discussed and thought through before the jury was waived. Its the majority's opinion on that point that these being practical matters they could not possibly be overlooked by competent counsel and consequently, the defendant took his chances with a three-judge panel.

Second, a motion for a new trial is based on misconduct of witness. We have not heard any evidence or argument concerning that particular point. However, I think since

in effect, this is akin to an appellate procedure and our Supreme Court has indicated an appellate court must take all of the points raised and make a ruling thereon, it must be shown that the witness, Wanda Bishop, was corroborated on four separate occasions by other witnesses on material that Wanda could have learned alone or could not have learned in any other way than from the mouth of the defendant. Particularly, she could know nothing about the relationship between the defendant and his mother and his brother concerning the living conditions at home unless he told her. And this was corroborated by Mrs. Clems, a witness brought forth by the defense. The fact that she was seen in a booth in the 19th Hole with the defendant's arm around her was again corroborated by Mrs. Farrell on one occasion. Now, yes, she recited more but at least once this was corroborated.

Likewise, the witness, Mrs. Swisshelm, indicated that the defendant had told her that he had at last found a girl that he was really interested in or could marry. And the witness Cornett corroborated some of the testimony of Wanda Bishop. The majority of the Court would overrule than ground as the basis for a new trial.

With regard to the third issue as to the lack of a unanimity as to the finding of the Court with regard to guilt or innocence, the Court could only reflect that the Statutes 2945.06 relate to the conduct of the trial and the statutes therein say that a majority of the judges on a three-judge panel shall decide all questions of law and of fact. And that was done in this case. Whereas Sec. 2903 and 2929.04 relate to Penalties and Sentencing mentioning only the word "unanimous" when it comes to the death penalty. And that's the law that was passed by the State legislature as it now stands on the books, the Ohio Revised Code. And, likewise, taking note of a decision by the United

States Supreme Court only last year to the extent that a legislature can provide without violating a defendant's Constitutional right of due process can provide for a lesser finding than unanimous in a criminal case. A legislature can provide for a lesser number than a unanimous finding.

> By the Court (Judge Cramer): It provides for a lesser number than 12. It didn't go into the question of unanimous.

Yes. Less number than 12. Likewise, by the State of Ohio letting 2945.06 stand, they have provided a means lesser than unanimous.

With regard to the fourth as to the weight of the evidence, the majority of the Court would find that it is not well taken and, therefore, would overrule the defendant's motion for a new trial.

(To Judge Fiehrer) Does that indicate your position?

Judge Fiehrer: Yes.

Judge Cramer: I must and therefore do respectfully dissent from my colleagues' decision denying defendant's motion for a new trial on all the grounds on which their conclusions are based except 1 which I will hereinafter refer to.

It is my opinion that the majority's failure to find the defendant was insane at the time he committed the offenses is contrary to law in that it is manifestly against the weight of the evidence. It is my opinion that the majority's verdict that the defendant was sane at the time of the commission of the offense is not sustained by sufficient evidence.

I believe the evidence preponderates in favor of the defendant's defense that he was insane at said time and therefor should have been found not guilty by reason of insanity. It is further my opinion that the State failed to

prove beyond a reasonable doubt that the 11 homicides were committed by the defendant with prior calculation and design as those terms are defined by law. Therefore, defendant could not be found guilty of aggravated murder as to any of the 11 persons who were killed. I am also of the opinion that a finding of either guilty of any crime, not guilty or not guilty by reason of insanity by a three-judge panel must be unanimously arrived at. The statute specifically providing for a three-judge panel's decision to be arrived at by a majority and in a capital case, the extension or non-extension of mercy also by a majority, though not specifically repealed when the new criminal code went into effect and the Criminal Rules adopted, I believe repealed by implication. Prior to January 1, 1974, the law permitted the extension or non-extension of mercy by a three-judge panel in a capital case by a majority of the judges. The law now provides that before the death sentence can be imposed the three judges must unanimously find that none of the mitigating circumstances has been established by a preponderance of the evidence. If a majority only is needed to come to a decision that a defendant has committed aggravated murder then in the event of a dissent as a practical matter the death penalty would never be imposed because the dissenter could and no doubt, would not join in a finding carrying with it the death penalty. Furthermore and more importantly, if a decision of a three-judge panel could be arrived at without unanimity but a jury's verdict must be unanimous which, of course, is the law then a defendant who chooses to be tried by a three-judge panel rather than by a jury which, of course, the law permits him to do in a capital case, by him waiving a jury, he is denied that equal protection of the law guaranteed by Art. 14 of the Amendment to the Constitution of the United States. For the State's burden

is considerably lessened and the defendant's increased because the State need not convince all three judges, trained and experienced in both fact-finding and applying the law as they are, therefore, more expertise than the average juror before securing a guilty verdict, a guilty finding. Therefore, the State's burden under such circumstances should not be lessened. Yet before a jury's verdict is secured all 12 unskilled laymen must agree. It would be our opinion that, therefore, legislation that permits a finding of guilty by less than a unanimous three-judge Court but requires a jury's verdict to be unanimous is unconstitutional. It would make the risk of a guilty finding greater, the price a defendant has to pay for his legal right to have a three-judge panel rather than a jury decide his fate.

In view of the Court's opinion that unanimity is required, the advice given to the defendant by his counsel prior to that given by the Court to counsel requiring unanimity would, in our opinion, require us to deny the defendant's motion for a new trial on that ground. In other words, in my opinion, in view of the fact that I believe unanimity is required, the defendant was not misled, was not misinformed respecting the requirement of unanimity. And, therefore, we have dissented from the majority's opinion overruling the motion for a new trial for the reasons stated.

APPENDIX D

Judgment Entry of Supreme Court of Ohio, May 17, 1978.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
)
City of Columbus.)

1978 TERM

To wit: May 17, 1978

THE STATE OF OHIO,
Appellant and Cross-Appellee,

vs.

JAMES U. RUPPERT,
Appellee and Cross-Appellant.

No. 77-1022

APPEAL AND CROSS-APPEAL FROM THE COURT OF APPEALS FOR BUTLER COUNTY

(Received May 19, 1978)

This cause, here on appeal and cross-appeal from the Court of Appeals for Butler County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein, and it ap-

pearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Butler County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19 .....

..... Clerk

..... Deputy

APPENDIX E

Ohio Revised Code Ann. § 2929.03 (Page 1975)
Ohio Revised Code Ann. § 2945.06 (Page 1975)

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the

offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury:

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

HISTORY: 134 v H 511. Eff 1-1-74.

Committee Comment

This section specifies the procedure to be followed in determining whether the sentence for aggravated murder is to be life imprisonment or death.

The death penalty is precluded unless the indictment contains a specification of one or more of the aggravating circumstances listed in section 2929.04. In the absence of such specifications, life imprisonment must be imposed. If the indictment specifies an aggravating circumstance, it must be proved beyond a reasonable doubt, and the jury must return separate verdicts on the charge and specification. If the verdict is guilty of the charge but not guilty of the specification, the penalty is life imprisonment.

If the verdict is guilty of both the charge and the specification, the jury is discharged and the trial begins a second phase designed to determine the presence or absence of one or more mitigating circumstances. If one of the three mitigating factors listed in section 2929.04 is established by a preponderance of the evidence, the penalty is life imprisonment. If none of such factors is established, the penalty is death. The procedure is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules of evidence apply, the specification must be proved beyond a reasonable doubt, and the panel's verdict must be unanimous.

With respect to the mitigation phase of the trial, the procedure is somewhat different depending on whether the case is tried by a jury or a three-judge panel. A jury tries only the charge and specification, and the judge in a jury trial determines mitigation. If a jury is waived, the same three-judge panel tries not only the charge and speci-

fication, but also determines the presence or absence of mitigation. Also, the statute expressly provides that the panel's finding that no mitigating circumstance is established must be unanimous, or the death penalty is precluded. In other respects, the procedure for determining mitigation is similar whether the trial judge or a three-judge panel tries the issue. Mitigation must be established by a preponderance of the evidence, and the rules of evidence also apply in this phase of the trial (the requirement for a pre-sentence investigation and report, the requirement for a psychiatric examination and report, and the provision for an unsworn statement by the defendant, represent partial exceptions to the rules of evidence).

§ 2945.06 Jurisdiction of judge when jury trial is waived; three-judge court. (GC § 13442-5)

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which such cause is pending shall proceed to hear, try, and determine such cause in accordance with the rules and in like manner as if such cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time of the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of said court, and in case there is neither presiding judge nor chief justice, by the chief justice of the supreme court. Such judges or a majority of them may decide all questions of fact and law arising upon the trial, and render judgment accordingly. If the accused pleads guilty of murder in the first degree, a court composed of three judges shall examine the witnesses, determine the degree of crime, and pro-

nounce sentence accordingly. In rendering judgment of conviction of an offense punishable by death upon plea of guilty, or after trial by the court without the intervention of a jury, the court may extend mercy and reduce the punishment for such offense to life imprisonment in like manner as upon recommendation of mercy by a jury. If in the composition of said court it is necessary that a judge from another county be assigned by the chief justice, such judge shall be compensated for his services as provided by section 141.07 of the Revised Code.

HISTORY: GC § 13442-5; 113 v. 123 (179), ch.21 § 5; 115 v 531, § 1. Eff 10-1-53.

Comment: See related Crim. R. 23(C). Note that the procedure in murder cases is now determined by RC §§ 2929.03, 2929.04.

§ 2945.07 Trial in felony cases by three-judge court. (GC § 13442-5a)

In any felony case, except cases involving a capital offense, wherein the defendant has waived a trial by jury, the defendant may file a request with the trial court for a trial before a court of three judges and if such request is granted by the trial judge the case shall be so tried. If the request is not granted by the trial judge the case shall be tried as provided in section 2945.06 of the Revised Code. If tried by a three[-]judge court, such judges or a majority of them may decide all questions of fact and law arising upon the trial and render judgment accordingly. Such court shall consist of the trial judge and two other judges who shall be designated by the presiding judge or chief justice of said court, or, if there is neither presiding judge nor chief justice, by the chief justice of the supreme court.

HISTORY: GC § 13442-5a; 120 v 707, § 1. Eff 10-1-53.